Supreme Court, U.S.
FILED
FEB 11 1998
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(2)

No. 97-977

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIAMOND WALNUT GROWERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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30 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner failed to establish a substantial and legitimate business justification for its discriminatory refusal to give striker Alfonsina Munoz a job as a forklift driver when she returned to work during an economic strike.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 7a-66a) is reported at 113 F.3d 1259. The panel opinion of the court of appeals (Pet. App. 71a-107a) is reported at 80 F.3d 485. The decision and order of the National Labor Relations Board (Pet. App. 108a-124a) and the decision of the administrative law judge (Pet. App. 125a-163a) are reported at 316 N.L.R.B. 36.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 1a-6a) was entered on September 11, 1997. The petition for a writ of certiorari was filed on December 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is engaged in the processing and sale of walnut products at a facility in Stockton, California. Pet. App. 128a. Prior to 1991, petitioner and the Union[1] had negotiated a series of collective-bargaining agreements covering petitioner's year-round and seasonal employees. *Id.* at 110a, 128a. The parties' most recent contract expired on June 30, 1991. *Id.* at 128a. On September 4, 1991, the Union began an economic strike against petitioner. Petitioner continued operations by hiring year-round and seasonal permanent replacement workers. *Id.* at 110a. During the strike, the Union urged the public to boycott petitioner's product and sponsored a national bus tour, in which union members distributed leaflets to the public that described petitioner's workforce as composed of "scabs" who packaged walnuts contaminated with "mold, dirt, oil, worms and debris." *Id.* at 9a, 115a-116a, 144a-145a.

While the strike was in progress, the Union filed a representation petition with the National Labor Relations Board (Board) for an election among petitioner's employees, including its replacement employees. The Board scheduled an election for October 7 and 8, 1993. Pet. App. 110a.[2] On September 21, 1993,

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[1] Cannery Workers, Processors, Warehousemen & Helpers, Local 601, International Brotherhood of Teamsters, AFL-CIO. Pet. App. 8a.

[2] The 1993 election was actually a rerun election. In 1992, the Board, acting on the Union's petition, had conducted an election among petitioner's employees, which the Union lost. The Board, however, set aside the result of the 1992 election on the basis of objections filed by the Union, and ordered a new election. Pet. App. 9a, 109a, 126a & n.3.

the Union informed petitioner that striking employee Alfonsina Munoz wished to return to work unconditionally, because she "fe[lt] that it is important that the replacement workers . . . have an opportunity to hear from Union sympathizers" in advance of the upcoming election. *Id.* at 110a-111a. Munoz had participated in the Union's bus tour and leafletting campaign. *Id.* at 117a.

Before the strike, Munoz had held a year-round job with petitioner as a forklift driver in its carton warehouse. Pet. App. 111a, 139a. Petitioner informed the Union that only seasonal jobs were available for her, and she agreed to accept a seasonal job. *Id.* at 111a. When Munoz returned to work, petitioner had seasonal openings available for forklift drivers. Petitioner, however, assigned Munoz to a lower-paying job as a "cracker." That job required her to crack open walnuts received from growers to determine the quality of the walnuts and the price to be paid the grower. *Id.* at 111a, 140a.

The Board conducted the election among petitioner's employees as scheduled. Pet. App. 112a. After casting her ballot, Munoz rejoined the strike. *Ibid.* The Union lost the election. *Id.* at 109a & n.2.

2. Acting on a charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against petitioner. Pet. App. 125a. The complaint alleged, among other things, that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3) and (1), by failing to offer Munoz a position as a seasonal forklift driver. Pet. App. 127a.[3]

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[3] The General Counsel also alleged that petitioner had violated Section 8(a)(3) and (1) in refusing to offer two other

The Board, reversing in part the decision of the administrative law judge, found that petitioner had violated Section 8(a)(3) and (1) of the Act, with respect to Munoz. Pet. App. 108a-124a. The Board explained that, under its decision in *Rose Printing Co.*, 304 N.L.R.B. 1076, 1078 (1991), "strikers who have unconditionally offered to return to work are * * * entitled to return to [their former] jobs or substantial equivalents if such positions become vacant, *and they are entitled to nondiscriminatory treatment in their applications for other jobs.*" Pet. App. 114a (emphasis added in Board's decision below). In light of the General Counsel's concession that the seasonal forklift driver position that petitioner had available was not "substantially equivalent" to Munoz's pre-strike year-round forklift job, the Board accepted that petitioner was under no legal obligation under *Rose Printing* to "reinstate" Munoz to another job that was not "substantially equivalent." *Id.* at 115a. However, the Board stressed, "once [petitioner] voluntarily decided to reinstate [Munoz], it was required to act in a nondiscriminatory fashion" in assigning Munoz to a position. *Ibid.*

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returning strikers, Willa Miller and Mohammed Kussair, seasonal jobs as quality control assistant and loader, respectively, when they unconditionally offered to return to work during the strike. Pet. App. 127a. Although the Board found that petitioner had violated the Act in respect to Miller and Kussair (see *id.* at 111a-112a, 122a), the court of appeals disagreed, and denied enforcement of the Board's order in respect to those two employees. *Id.* at 13a n.2, 22a-27a. Because the situations of Miller and Kussair are not directly relevant to the issues presented in the petition, the facts relating to them are not set forth here in detail.

The Board observed that petitioner defended its refusal to give Munoz a seasonal forklift driver job on the basis that it had satisfied its burden, under *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), of showing that the refusal was for "legitimate and substantial business justifications." Pet. App. 115a.[4] One of petitioner's proffered business justifications, the Board noted, was based on "violence committed against the replacement employees, which [petitioner] contends raised the specter of replacement employees retaliating in kind against the strikers." *Id.* at 117a. The Board rejected that justification, having found no evidence that Munoz was involved in the violence against replacement workers and no "specific evidence that any replacements harbored hostility toward" Munoz. *Ibid.* Petitioner also contended that, "[g]iven that she was an active participant in the boycott and bus tour where its walnuts were asserted to be tainted," Munoz, as a forklift driver, would have had the "opportunity * * * to damage its product by driving the 11,000 pound lift trucks in a careless manner." *Id.*

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[4] In *Fleetwood Trailer*, this Court held that, "[i]f, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike. * * * Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378. Here, although the strike had not concluded when Munoz offered to return to work, and petitioner did not refuse to reinstate her entirely (but rather placed her in a job that was "objectively less desirable" than the one she sought, Pet. App. 14a), nonetheless, throughout this litigation, it has been "undisputed that the *Fleetwood* framework governs this case." *Id.* at 13a; see also *id.* at 115a.

at 116a. The Board rejected that proffered justification as well, explaining that the strikers' conduct in regard to the Union's consumer boycott and leafletting "constituted protected Section 7 activity," and that there was "no evidence indicating that such protection was lost because of threats made by * * * Munoz to damage or sabotage [petitioner's] equipment or products." *Id.* at 118a.

3. A panel of the court of appeals initially denied enforcement of the Board's order, Pet. App. 71a-107a, but, on rehearing en banc, the court enforced the Board's order as to Munoz, *id.* at 17a-22a, 29a-30a.[5]

The court first concluded that the Board's rejection of petitioner's justification of its discriminatory treatment of Munoz based on concern for her personal safety "easily passes the reasonableness test." Pet. App. 21a.[6] The court explained that, although

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[5] Judge Silberman's opinion "for the Court" (Pet. App. 8a) was joined in full by Judges Williams and Ginsburg. Judge Wald filed an opinion, joined by three other judges, concurring as to Munoz and Kussair but dissenting as to Miller. Judge Henderson filed an opinion, joined by two other judges, dissenting as to Munoz but concurring as to Miller and Kussair.

[6] The court noted that, "in determining whether [petitioner] had a substantial business justification * * * the Board made a normative judgment, a mixed policy/legal determination, which would typically be reviewed according to the arbitrary and capricious standard of the Administrative Procedure Act (reasonableness)," which is implicitly incorporated in the judicial review provisions of the Act. Pet. App. 20a. See also *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) ("It is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.") (internal quotation marks omitted).

"[a]n employer's concern for the safety of a few returning strikers, put in the midst of a majority of replacements in a strike marked by violence, may be genuine * * * it is hardly unreasonable for the Board to insist, at minimum, on evidence of a concrete threat to those strikers." *Id.* at 20a. Otherwise, the court observed, "such a generalized concern could all too easily serve as a handy pretext for disfavoring returning strikers." *Ibid.*

Similarly, the court concluded, "the Board was reasonable in its determination that the risk of Munoz engaging in sabotage while riding around on her 11,000 pound forklift * * * is not a substantial business justification for her disadvantageous placement in another job." Pet. App. 21a. The court explained that, while "[t]here is * * * undeniably some risk in employing returning strikers during a strike * * * it could not be seriously argued that an employer cannot be forced to assume *any* risk of sabotage, because that would be equivalent to holding that an employer need not take back strikers during an ongoing strike at all—at least unless they manifested a break with the union." *Ibid.* The court suggested that "[o]ne factor to consider in evaluating the risk posed by a returning striker is the company's ability to detect his or her unlawful activity"; here, "if Munoz engaged in forklift sabotage, it would presumably be readily detectable." *Ibid.* The court found that "[p]etitioner has shown no particularized evidence to buttress its primary concern—that there is a risk that she would misuse the forklift." *Id.* at 22a.[7]

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[7] Judge Silberman's opinion distinguished Munoz's situation from that of Willa Miller, who sought a quality control

ARGUMENT

The court of appeals correctly upheld the Board's determination that petitioner failed to establish a "legitimate and substantial business justification," under *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), for its discriminatory treatment of Alfonsina Munoz in refusing to give her a seasonal forklift driver job when she returned to work during an

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assistant job. Pet. App. 22a-29a. He concluded that "placing Miller in the position of quality control assistant presented extraordinary risks." *Id.* at 28a. Suggesting that "[o]ne well-publicized worm might eviscerate the company's market share, especially in light of the public's 'awareness' (due to the union's campaign) that Diamond's product might be tainted" (*id.* at 25a), Judge Silberman concluded that Miller would have been "put in a rather acute and unusual conflict of interest in which her job for her employer could be thought to have as a function the rebutting of her union's claim." *Id.* at 26a. "To make matters worse, any 'mistake' by Miller on the product quality control line would not be easily attributable to her." *Id.* at 27a.

Judge Wald, joined by Chief Judge Edwards and Judges Rogers and Tatel, would have enforced the Board's order as to Miller, as well as Munoz. Pet. App. 29a-52a. Judge Wald believed that "the Board's conclusion that [petitioner's] discriminatory treatment of Miller was unjustified was neither arbitrary nor illogical." *Id.* at 33a.

Judge Henderson, joined by Judges Sentelle and Randolph, would have denied enforcement of the Board's order as to both Munoz and Miller. Pet. App. 52a-66a. Judge Henderson concluded that the Board's General Counsel had failed to establish a *prima facie* case of discrimination as to either employee. See *id.* at 53a-61a; see also *id.* at 65a-66a. Judge Henderson also concluded in the alternative that, even if the General Counsel had established a *prima facie* case, petitioner had a "legitimate and substantial business justification for placing both workers where it did and therefore did not violate the Act under *Fleetwood*." *Id.* at 61a; see also *id.* at 61a-62a, 65a-66a.

economic strike. The court's decision is fact-specific, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 8) that this Court should grant review to decide the question that it is said to have left open in *NLRB* v. *Town & Country Electric, Inc.*, 516 U.S. 85 (1995), namely, "when, if ever, can an employer place limitations on Union agents who seek to enter a workplace as employees." See also Pet. i, 15. According to petitioner (Pet. 8), in *Town & Country*, this Court "specifically suggested that there might be situations where the conflict of interest between a union agent and an employer justifies the employer treating the union agent differently." That contention, however, rests on a misreading of *Town & Country*.

In *Town & Country*, the Court upheld the Board's conclusion that "a worker [is] a company's 'employee' within the terms of the National Labor Relations Act * * * [even] if, at the same time, a union pays that worker to help the union organize the company[.]" 516 U.S. at 87. The Court "granted certiorari to decide only that part of the controversy that focuse[d] upon the meaning of the word 'employee,'" *id.* at 89, and it did not address the question whether the employer in that case had actually committed an unfair labor practice against any employee, *id.* at 97-98. The Court did not suggest that an employer could, consistent with the Act, deem an employee's engagement in protected activity to be a conflict of interest that would permit the employer to take discriminatory action against that employee. In fact, the Court made clear that "the employer has no legal right to require that, as part of his or her service to the company, a

worker refrain from engaging in protected activity," even where "a company perceives those protected activities as disloyal." *Id.* at 96. And the Court noted that an employer that is concerned about illegal behavior by employees has remedies that do not involve discrimination against employees based on an unsupported fear of future behavior; for example, the employer "can discipline or dismiss the worker [who acts unlawfully], file a complaint with the Board, or notify law enforcement authorities." *Id.* at 97. The petition therefore presents no important issue regarding the application of *Town & Country* that warrants this Court's review.

2. Relying on the Board's decision in *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992), petitioner asserts (Pet. 8, 9-12) that it met its burden, under *Fleetwood Trailer*, of demonstrating a "substantial and legitimate business justification" for its refusal to give Munoz a forklift driver job. That is so, according to petitioner (Pet. 8), because Munoz had a "conflict of interest" arising from the fact that she entered the plant under strike conditions. Petitioner's contention, however, is not properly presented, and, in any event, it lacks merit.

a. As the court of appeals found (Pet. App. 17a), petitioner "never cited *Sunland* to the Board, nor did it claim that the principles of *Sunland* should govern the case." Accordingly, the court did not address the merits of petitioner's claim based on *Sunland* because it concluded that petitioner was jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from raising it on judicial review of the Board's order. Pet. App. 17a. The court's ruling on that basis is correct. Section 10(e) provides that "[n]o objection that has not been urged before the Board

* * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner has pointed to no "extraordinary circumstances" excusing its failure to raise its *Sunland* objection before the Board.[8] And as the court pointed out, the Board cannot be faulted "for failing to distinguish arguably applicable precedent when the petitioner never raised it or the proposition it stands for." Pet. App. 17a. Accordingly, petitioner is jurisdictionally barred by Section 10(e) from asserting its *Sunland* claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

b. In any event, petitioner's reliance on *Sunland Construction Co.* is misplaced. In *Sunland*, the Board held that, although a paid union organizer is an "employee" within the meaning of the Act, an employer does not violate Section 8(a)(3) of the Act by refusing to hire a paid union organizer who applies for work during a strike. 309 N.L.R.B. at 1225-1230. The Board explained that, "given the conflict between an employer's interest * * * in operating during a strike and a striking union's evident interest in persuading employees *not* to help it operate," the employer, in such circumstances, has "a 'substantial and legitimate' business justification for declining to hire a paid agent of the [u]nion for the duration of the strike." *Id.* at 1231.

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[8] Petitioner's assertion (Pet. 11 n.6) that the court of appeals erred in concluding that petitioner did not urge its objection before the Board raises only a fact-bound issue that does not warrant this Court's review.

The Board's decision in *Sunland*, however, was expressly limited to *paid* union organizers; "[e]mployees who are not on a striking union's payroll are another matter." 309 N.L.R.B. at 1231 n.41. Because such employees "are not obligated to the union as paid agents, it cannot necessarily be presumed that they will be seeking to further the union's object of depriving the employer of employee services during the strike." *Ibid.* Thus, employers do not have "carte blanche" under the Act to discriminate against pro-union employees who seek to return to work. See *ibid.* Munoz was not a paid agent of the Union. See Pet. App. 16a. Moreover, her object in returning to work was to persuade the replacement workers to support the Union in the upcoming election (*id.* at 110a-111a), not to urge them to join the strike. Accordingly, *Sunland* does not provide petitioner with a "substantial and legitimate business justification" for refusing to offer Munoz a forklift driver job when she returned to work merely by pointing to the fact that the strike was still in progress.

3. Petitioner argues that it had a second and independent basis for denying Munoz a seasonal forklift job when she returned to work. According to petitioner, Munoz's participation in the Union's leafletting campaign disparaging its product was not protected activity under the Act and created a conflict of interest on the part of Munoz. Pet. 13-15. That contention is not properly presented and, in any event, it lacks merit.

a. Before the court of appeals, petitioner "[did] not challenge the Board's conclusion that the 'tainted walnuts' campaign was protected" by the Act; accordingly, the court declined "*sua sponte*, to decide that issue." Pet. App. 23a. Rather, in the court of

appeals, petitioner defended its treatment of Munoz on the ground that it had established a "substantial and legitimate" business justification, under the *Fleetwood Trailer* framework (which *assumes* the existence of protected activity), for refusing to give her a forklikft driver job. *Id.* at 15a, 17a-22a. Review by this Court of the question whether the Union's leafletting campaign was protected by the Act is therefore not warranted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("[W]e do not ordinarily consider questions not specifically passed upon by the lower court."). Similarly, before the Board, petitioner did not contend that the Union's leafletting campaign constituted unprotected activity; rather, petitioner contended that "[t]he crux of the issue is whether the employer had substantial and legitimate business justification for its placement of the strikers." See Employer's Limited Exceptions to the Decision of the Administrative Law Judge 28 (July 26, 1994). Having failed before the Board to raise its claim that the Union's leafletting was unprotected by the Act, petitioner is jurisdictionally barred from asserting that claim in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing*, *supra*.[9]

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[9] Petitioner also suggests (Pet. 12, 15) that, in light of the Union's claim, in the leaflet, that petitioner was producing tainted walnuts, Munoz had a "conflict of interest," in the sense that, as a forklift driver, she would have had "unlimited and unsupervised access to [its] food products" and thus could have tampered with the product. See also Pet. 13. Unlike the claim described in the text above, petitioner, in so contending, appears to concede that the Union's leaflet was protected by the Act, but defends its conduct on the ground that Munoz's alleged ability to tamper with the product was a substantial and legitimate business justification, under *Fleetwood Trailer*,

b. Furthermore, petitioner's contention that Munoz's participation in the Union's leafletting was unprotected activity is without merit, and *NLRB* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953), on which petitioner relies, does not support its contention. The issue in that case was whether the employer acted "for cause" in discharging employees who had distributed handbills to the public which were critical of the employer's product (there, television programming). *Id.* at 465-468. In agreeing with the Board that the handbills were not protected by Section 7 of the Act, 29 U.S.C. 157, the Court noted that the handbills "asked for no public sympathy or support," "diverted attention from the labor controversy," and had "no discernible relation" to the controversy between the union and the company. 346 U.S. at 476. Those circumstances do not obtain in respect to the Union's leaflets here, which were clearly part of the Union's ongoing economic dispute with petitioner and its effort to garner the public's support in that dispute by urging the public not to buy petitioner's product. See Pet. App. 115a-116a, 144a-145a.

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for denying her a forklift driver job. The court of appeals declined to address petitioner's *Fleetwood Trailer* defense insofar as it was premised on Munoz's alleged ability to "place foreign matter into the finished walnut bags," because petitioner "did not emphasize this point to the Board any more than it did in its brief and argument before [the court]." Pet. App. 15a-16a n.4. In any event, petitioner's argument is unpersuasive: as the Board noted (*id.* at 117a n.11), petitioner conceded that, even in the "cracker" position to which she was assigned after returning to work, Munoz was allowed to " 'freely roam[]' the plant unsupervised during her breaks."

Petitioner also contends (Pet. 14) that the Union's leaflet is indistinguishable from the one found by the Board to be unprotected by the Act in *Coca Cola Bottling Works*, 186 N.L.R.B. 1050 (1970), enforced in part *sub nom. Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972). In that case, the Board found the union's leaflet to be unprotected by the Act, notwithstanding that it "referred to a labor controversy," because it amounted to "an attack on the [c]ompany's product and an effort to persuade members of the public not to purchase Coca Cola." 186 N.L.R.B. at 1064. The *Coca Cola Bottling Works* decision, however, does not reflect the Board's current position. See, *e.g.*, *Cordura Publications, Inc.*, 280 N.L.R.B. 230, 231-232 & n.7 (1986) (employees' criticism of employer's product protected where "directly related to concerns about the employees' terms and conditions of employment," not couched in "sufficiently opprobrious, defamatory, or malicious language," and not "deliberately or maliciously false"); see also Pet. App. 47a-51a, 146a-151a. The Board's new position has received approval by the courts. See, *e.g.*, *Sierra Publishing Co.* v. *NLRB*, 889 F.2d 210 (9th Cir. 1989); *Misericordia Hosp. Med. Ctr.* v. *NLRB*, 623 F.2d 808 (2d Cir. 1980). And as this Court has explained, because "[c]umulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated," the Board may change its interpretation of the Act, provided that the new construction is a permissible one. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-267 (1975) (internal quotation marks omitted). Accordingly, there is no merit to petitioner's contention that Munoz's participation in the Union's leafletting prov-

ided it with a substantial and legitimate justification for denying her a job as a forklift driver.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1998